OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 DECEMBER 1978 [1]

Mr President,
Members of the Court,

The applicant in this case has been employed by the European Communities in their Information Office since January 1961. The very unusual nature of the employer and employee relationship in her case has led to these proceedings.

At the beginning the applicant had a contract as an expert which was repeatedly extended, on the last occasion until 28 February 1964. From 1 March 1964 she was employed as a member of the auxiliary staff within the meaning of Article 3 of the Conditions of Employment of Other Servants; this contract too was repeatedly extended, on the last occasion until 31 December 1968. With effect from 1 January 1969 there ensued a period of employment as a member of the temporary staff within the meaning of Article 2 of the Conditions of Employment of Other Servants. This lasted first of all until 31 December 1969 and was subsequently extended until 31 December 1971. This was followed once again by a contract employing the applicant as a member of the auxiliary staff which then lasted, with an extension, until 30 November 1972. From 1 December 1972, the applicant, as provided in a decision of 7 February 1973, was a probationary official; with effect from 1 September 1973 she was finally established as a permanent official by a decision of 22 October 1973.

In the present proceedings the applicant, who has declared that essentially she has always carried out the same duties as a principal administrator, is concerned to ensure that the periods during which she was employed as an expert and as a member of the auxiliary staff and for which, as regards the time as an expert, no social insurance contributions were paid by the Community or, as concerns the employment as a member of the auxiliary staff, she was insured with the Belgian social insurance, are taken into account in assessing the retirement pension to which she will one day become entitled under the Staff Regulations.

For this purpose she applied on 21 June 1976 to the Head of the Individual Rights and Privileges Division. She asked that for the periods already mentioned (1 January 1961 to 28 February 1964; 1 March 1964 to 31 December 1968; 1 January 1972 to 30 November 1972) she should be permitted to buy in additional pension rights within the meaning of Article 11 of Annex VIII to the Staff Regulations. To that application she received a notification dated 2 July 1976 that the transfer to the Community of the rights acquired under the Belgian social insurance was not possible owing to the absence of an agreement for that purpose.

As a result the applicant made a further application on 13 August 1976 to the Head of the Individual Rights and Privileges Division. This time she did not mention buying in pension rights but expressed the view that the periods in question should be assimilated, for purposes of the rules relating to pension, to periods of employment as an official or a member of the temporary staff. This, she claimed, was at any rate so as regards the second period of employment as a member of the auxiliary staff since that followed immediately on the period during which the applicant

1 — Translated from the German.

had been a member of the temporary staff and for which it was beyond doubt that it must be taken into consideration in the context of the rules relating to pension. To this the applicant received a reply dated 14 September 1976 to the effect that the period during which she had been employed as a member of the temporary staff could indeed be taken into consideration in accordance with Article 3 (c) of Annex VIII to the Staff Regulations for the purpose of calculation of pension. However, as regards the second period of employment of the applicant as a member of the auxiliary staff an assimilation to periods of employment as an official was impossible; for this it would only be possible to buy in pension rights within the meaning of Article 11 (2) of Annex VIII to the Staff Regulations. As regards the period during which the applicant had been employed as an expert, her application to buy in pension rights was still being considered.

In a further approach to the Head of the Individual Rights and Privileges Division dated 17 March 1977 the applicant repeated her point of view that both her period of service as an expert and that as a member of the auxiliary staff should be assimilated to periods of service as an official for the purpose of her rights to pension as during those periods the applicant had worked under the same conditions as officials. Furthermore, as regards her employment as a member of the auxiliary staff, it should be borne in mind that it had been interrupted by a period during which the applicant had been a member of the temporary staff. To this the Director of Personnel replied in a note of 30 June 1977 that it was not possible to take into account in the calculation of her entitlement to pension the period during which she had been employed as an expert.

Thereupon the applicant on 20 July 1977 lodged with the appointing authority a formal complaint in pursuance of Article 90 of the Staff Regulations. In it she criticized the "decision" contained in the note to which reference has just been made and claimed afresh that the periods in which she had been employed as an expert and as a member of the auxiliary staff should be assimilated for the purpose of the rules relating to pension to periods served by officials or members of the temporary staff. This complaint received a reply in a letter of 15 February 1978 signed by a member of the Commission in which reference was made to the fact that for the periods in which she had been employed as a member of the auxiliary staff the applicant had pension rights as against the Belgian social insurance, to which the Commission had paid contributions In relation to her period as an expert it would be necessary to carry out a comprehensive examination of the question on a general basis; the applicant would be informed of the result as soon as it was known.

On 17 February 1978 the applicant brought an action before the Court claiming:

— A declaration that the contracts entered into between her and the Commission, relating to the periods from 1 January 1961 to 31 December 1968 and from 1 January 1972 to 30 November 1972 are to be regarded as having been concluded with a member of the temporary staff;

— In the alternative, a decision that for the calculation of her years of pensionable service for the purposes of her retirement pension the said periods of employment are to be assimilated to periods of employment as an official or at least as a member of the temporary staff;

— An order that the Commission should take the periods in question into account as years of pensionable service; and,

— The annulment of the implied decision rejecting the applicant's complaint registered on 22 July 1977.

My view on these claims is as follows:

I — Admissibility

The admissibility of the application is contested by the Commission from several points of view.

1. Above all it expresses the view that the applicant has no present interest in obtaining a clarification of questions concerning her future rights to retirement pension. It contends that such rights arise only with actual retirement and are therefore dependent on an uncertain future event; they also depend on the precondition that there has been a minimum period of service of 10 years (Article 77 of the Staff Regulations). Observations of the administration relating thereto have therefore no immediate legal consequences for the applicant's present situation. It should also be borne in mind that the point of view of the administration might change and that the Staff Regulations might be amended in this respect. The applicant has therefore at the most an abstract interest in the interpretation of the Staff Regulations. If this were to be regarded as sufficient it would more or less amount to enabling the public to undertake test actions on matters of general interest and in any case would create the risk of the bringing of all possible types of action with regard to the application of provisions of law to situations not yet existent and which might in fact never come to pass.

It seems to me that the Commission, obviously borrowing from French legal practice, is taking its stand on the basis of too narrow an understanding of the concept of "interest in bringing an action" or "interest in the protection of legal rights" which may well be of some significance for the civil service law of the European Communities too but which has nowhere been defined in greater detail. In the case-law up to the present the question of the admissibility of an application with comparable facts has not yet been decided. The judgments cited by the Commission (Case 23/69 *Anneliese Fiehn* v *Commission,* judgment of 9 July 1970, [1970] ECR 547, and Case 5/74 *Andreas Reinarz* v *Commission,* judgment of 11 July 1974, [1974] ECR 819), cannot at all events give rise to the view that a clarification of certain questions by legal action may only be attempted if the applicant has already attained the relevant status, namely that of *former* official.

The present case concerns the assessment of an official's future pension rights, which will be different according to whether certain periods of service performed for the Communities in the past are taken into account or not. It is clear that the applicant earns such rights continuously with each day of her employment as an official of the Communities. Even though these rights may only be claimed at a later date I am convinced that in this respect she already has at least a right to future enjoyment, the substance of which cannot simply be encroached upon even though certain details may still be altered by the legislature.

In my opinion this legal situation gives rise to a sufficient interest in the present clarification of problems connected therewith. Not only would it in fact appear wholly unsatisfactory that what may be lengthy discussions about the

scope of rights intended to secure old age should be allowed only at the time of commencement of retirement and thus to accept that a person entitled cannot at the proper time come into the full enjoyment of his pension or that a clarification of questions connected therewith — in particular if this has to be undertaken by his survivors — will be made much more difficult after the expiration of a considerable period of time. It should also be borne in mind that, according to the result of the clarification sought, the applicant might make other arrangements, such as additional insurance for old age — which cannot be done only when retirement begins — or arrangements to put an end to her administrative status at some appropriate time before the expiration of 10 years so as to arrange for the payment of a severance grant. In this respect it seems to me, having regard to Staff Regulations which lack any definition of the concept of an "interest in the protection of legal rights" that it would be unjustified to speak only of an irrelevant and indirect interest. It is also to be noted that other legal systems do not have such a narrow definition of this concept as is applied by French law. In this respect I refer to German law according to which by way of exception precautionary applications for a declaratory judgment are possible without its being necessary to await the adoption of an administrative measure to be expected in the future (cf. Bundesverwaltungsgericht (Federal Administrative Court), judgment of 12 January 1967, Neue Juristische Wochenschrift 1967, p. 996). Indeed it is not easy to see why the legal protection granted under Community law should remain below this level.

The application cannot therefore be designated as inadmissible on the ground that there is a lack of present interest in bringing an action.

2. Next the Commission contends that the application is also inadmissible because the statements of its administration in connexion with the question of the taking into account of the applicant's earlier periods of employment as regards the calculation of her pension are merely information about intended future behaviour, that is to say at the most preparatory acts but not acts adversely affecting an official within the meaning of Article 91 of the Staff Regulations. In fact, it is claimed, these statements had no immediate results in the sense of a definitive adverse effect; this would only arise with the fixing of the pension, for which the statements referred to represent merely one factor of several to be taken into account.

I cannot share this view either. We must take as our basis the fact that the statements in question concern a legal situation existing at the present time, the right to future enjoyment of a pension, on which, as they influence its extent, they have immediate effects. It is even conceivable that constitutive effect might be attributed to a positive decision formulated in the sense of the application, which would naturally influence also the way in which the refusal of such a measure was to be regarded. Nor can it in any way be said that the letters to which reference has been made contain simply information about future conduct on the part of the administration which has no binding force. On the contrary we are dealing, as the wording makes clear, with quite categorical replies to very precise inquiries on the part of the applicant, of which she may justifiably assume that if she does not dispute them they may one day be held against her.

Apart from this it must no doubt be conceded that the decisions of the administration of the Commission may be regarded as regards the fixing of her pension in a certain sense as preparatory acts. However, I would take the view that because of their independent legal content — only clear and precisely defined questions of law are concerned — and furthermore because of the considerable distance in time from the future act with which they are connected and not least because of the applicant's strong interest in a clarification now of these problems, such decisions can certainly not be compared with preparatory acts such as those already dealt with in the case-law (as for example in Case 11/64 — *Kurt Weighardt* v *Commission of the EAEC*, judgment of 7 April 1965, [1965] ECR 285, in which measures in the context of an integration procedure under Article 102 of the Staff Regulations were designated not as acts adversely affecting an official but only as measures preparatory to a decision which could not be independently contested).

For the above reasons the legal nature of the measures which are here in dispute also provides no grounds for denying the admissibility of the application.

3. We must also inquire whether the admissibility of the application may be contested on the ground that the applicant did not lodge her application in due time having regard to the prescribed periods for bringing an action before the Court.

In this respect no problems arise if one starts from the decision of the Director of Personnel on 30 June 1977. For a complaint against that decision was lodged in proper time within the period of three months, on 20 July 1977, and the application itself, lodged on 17 February 1978, was obviously not out of time, calculated from the date of the implied decision rejecting her complaint, which is deemed to have taken place on the expiration of four months.

However, the Commission doubts whether the complaint, which is a necessary precondition under Article 91 of the Staff Regulations to the lodging of an application to the Court, was lodged at the right time or whether the applicant should not have undertaken this step at an earlier date. Under the system for the protection of legal rights instituted by the Staff Regulations the administration had to be approached by the applicant on the question of the taking into account of earlier periods of service for the calculation of her pension, and the Commission takes the view that the decisive point of departure is the letter to the Head of the Individual Rights and Privileges Division on 13 August 1976, in which mention was made for the first time of the necessity of assimilating the periods in which the applicant was employed as an expert or as a member of the auxiliary staff to periods of service performed by members of the temporary staff. That, it is claimed, is to be regarded as a request in accordance with Article 90 of the Staff Regulations. To this the applicant received in a note of 14 September 1976 an express decision to part of the problem; the rest of her request — which related to the period as an expert — must on the contrary be regarded as having been refused by an implied decision after the expiration of four months from the lodging of the request, that is on 13 December 1976. The submission is accordingly that the period for lodging a complaint began to run on 14 September or 13 December 1976 as the case may be and calculated from that point the lodging of the complaint on 20 July 1977 must in any event be regarded as out of time. On the

other hand the express reply of 30 June 1977 on the question of the treatment of the period as an expert has no independent significance. On the contrary having regard to the implied refusal already deemed to have been made to the request in question it is to be treated purely as a confirmatory measure which could not start the period for the lodging of a complaint to start to run afresh. But if the complaint must be regarded as having been lodged out of time and thus as inadmissible the same is necessarily true for the application to the Court, lodged on 17 February 1978, which was dependent on it.

The applicant on the other hand takes the view that her letter of 13 August 1976 cannot be regarded as a formal request within the meaning of Article 90 of the Staff Regulations as it was not addressed to the appointing authority and it was not made in accordance with the procedure laid down for such a request in a circular of the Commission of 1 October 1974 — reference to Article 90 of the Staff Regulations, use of a special form and registration by the Secretariat General of the Commission. Secondly she claims that it is important that the administration in a note of September 1976 gave a reply to only a part of the problem and with regard to the period she spent as an expert the administration declared that that problem was still being examined. A reply to the question which had been left open was only given on 30 June 1977 after a reminder from the applicant in March 1977. It is the former date therefore which must be regarded as decisive, not least because the letter of 30 June 1977 formed a single entity with the letter of September 1976 and must be regarded as such.

In deciding this dispute it is important whether one is inclined to a formalistic point of view or not. In my view a severely formalistic view to the disadvantage of an applicant is justified at most in cases in which the interests of third parties are also involved, for which reason — and here the point of view of legal certainty plays a part — in particular care must be taken that the periods specified are exactly observed. There can be no question of that however in the present case; for that reason on first principles I regard a liberal approach as being justifiable as far as concerns the question of the approach to the Commission, as regards the significance of a temporizing reply to such an approach and in particular as regards the necessity for a comprehensive assessment of several separate answers of the administration to a single request put forward by an employee. I feel justified in taking this view first on the basis of two judgments delivered on the question of a legally effective approach to the administration by an employee. Thus in Joined Cases 22 and 23/60 *(Raymond Elz* v *High Authority of the ECSC,* judgment of 13 July 1961, [1961] ECR 181) it was made clear that a binding application to the administration is present only if it is made sufficiently clear that it is intended to set in progress periods for the lodging of an application. Similarly in Case 31/72 *(Domenico Angelini* v *European Parliament,* judgment of 4 April 1973, [1973] ECR 403) a letter which was intended to draw the attention of the administration to alleged claims by the applicant was not regarded as a request within the meaning of Article 90 of the Staff Regulations although it had already been preceded by other steps and in it attention was expressly drawn to the fact that an unfavourable decision would oblige the applicant to take other steps. Secondly a comparatively liberal viewpoint is justified by the recognition

that the cases dealt with in the case-law of irrelevant and temporizing answers concerned exclusively cases in which that type of answer had been given to formal *complaints* (Case 24/69 — *Theo Nebe* v *Commission,* judgment of 14 April 1970, [1970] ECR 145, — and Case 79/70 — *Helmut Müllers* v *Social and Economic Committee of the EEC and EAEC,* judgment of 7 July 1971, [1971] ECR 689).

From that point of view however the letter of August 1976 in which the applicant for the first time made her approach to the administration which forms the subject-matter of these proceedings, is not yet to be regarded as a request within the meaning of Article 90 of the Staff Regulations; it is true that such a request may on the other hand be seen in the reminder of March 1977 and calculated from that time the periods have been observed. Furthermore the note of 14 September 1976, which did not deal exhaustively with her inquiry, did not yet provide the applicant with any cause to react with a complaint; on the other hand this note must rather be regarded as forming a single entity with that of 30 June 1977 which contained the remainder of the answer which she had been led to expect, so that it was only after that point that the lodging of a complaint could be contemplated.

If this viewpoint is accepted it is clearly wrong to speak of the application's having been made out of time and therefore to regard it as inadmissible.

4. Finally the Commission objects to the fact that the application contains a request for a declaration; it further complains that the application is defective inasmuch as it speaks only of annulment of the implied rejection of the complaint and that the acts adversely affecting the applicant which are really at issue, namely the notes of 14 September 1976 and 30 June 1977 have not been mentioned.

In my view these objections are also unfounded.

It is true that in the judgment in Case 32/68 *(Giuseppe Grasselli* v *Commission,* judgment of 10 December 1969, [1969] ECR 505) it was emphasized that in staff cases the Court of Justice could not give a declaratory ruling. However, that was in a case in which the measure contested was simply to be regarded as information and the application for its annulment had therefore to be regarded as inadmissible. My view is that in a case like the present, even if the system of protection of legal rights under the Staff Regulations does not expressly provide for applications for declaratory rulings, there is no objection to the Court's making declarations which are necessary in conjunction with the annulment of a contested measure, not only in the statement of the reasons on which the judgment is based but also in the operative part of the judgment itself. However, even if this opinion were not to be followed, this would certainly not have as a consequence the inadmissibility of the application as a whole but it would simply give grounds for a logical re-interpretation of the claim in question as the request which it embodies is certainly not withdrawn from the purview of the Court.

With regard to the Commission's second objection my view is that the measures contested by the applicant are clearly enough defined by the reference to the complaint and its content. In the event of the annulment of the rejection of the complaint the Commission is naturally under a duty to draw from it the logical conclusions as regards the measures referred to in the complaint. From the

applicant's point of view this appears in fact to be sufficient. Finally I should also like to refer to the fact that in the oral procedure the applicant expressly declared that if necessary she would reformulate her application for annulment so as to include both the decisions referred to. If this should be regarded as necessary — and in my opinion it is not — the declaration in the oral procedure could certainly be accepted, since in essentials this would not be an amendment of the application but at the most a clarification and re-interpretation of claims already contained in the application.

II — Substance

The substance of the action concerns the question whether the applicant's periods of employment as an expert or as a member of the auxiliary staff are to be taken into acount in calculating the amount of her pension. In the applicant's view this should be accepted on three grounds.

1. First of all there is her argument that the contracts to which she refers were in fact, despite the name given to them at that time by the parties, to be regarded, on the basis of objective data, as contracts for the employment of temporary staff within the meaning of Article 2 of the Conditions of Employment of Other Servants. Even during the time of her employment as an expert the applicant was in a relationship of subordination to the Commission and had acted exclusively for the Commission. Furthermore she always carried out the same duties, which previously had not been undertaken by anybody, and therefore in particular she did not replace an official or other employee who was for the time being unable to perform his duties. Finally, at least since 1963 the detailed list of posts applicable to her department showed a permanent post the duties of which corresponded to those of the applicant.

With regard to this submission it is necessary to clarify first of all the preliminary question whether the applicant was actually employed as an expert with exactly defined individual tasks or whether in fact she was engaged as an employee, that is to say merely had to carry out tasks of a specified nature and thus stood in a relationship of subordination to the Commission. In this respect the Commission has indicated that experts' contracts contained no provision with regard to the type of duties and their performance and that certain powers of assignment not implying any subordination within the sense of the law of employer and employee, were also to be found in other than the ordinary contracts of employment. On the other hand I have no serious doubt that from 1961 onwards the applicant in spite of the denomination of her contracts as contracts for the employment of an expert stood in a regular relationship of employment to the Communities so that the Commission must for this period arrange retroactively for social insurance protection with the national institutions, and this it has declared itself ready to do To reach this conclusion it is sufficient to refer to notes of the applicant's superiors which are annexed to the application as Annexes 25, 30 and 33. In them there is reference to the enduring character of the applicant's duties, to the fact that she had been performing them for nine years and in particular also to the fact that since 1961 efforts had been made to regularize her situation, which can only mean that the express designation of her con-

tractual relationship did not coincide with reality.

Admittedly this is not decisive as regards the applicant's actual claim, for a correction of the designation of the contracts as an expert does not necessarily mean that they are to be regarded as contracts for the employment of temporary staff; they might just as well be regarded as contracts for the employment of auxiliary staff.

In the further investigation of the question which of the two designations is in fact the appropriate one, one must agree with the Commission at least in so far as it regards designation of the contract as a temporary one as being excluded for the year 1961 because the Conditions of Employment of Other Servants, which provide for contracts of that type, and the Staff Regulations of Officials came into force only on 1 January 1962. The applicant could therefore be a member of the temporary staff at the most only from 1962 onwards.

There is the further point that for the whole of the period under consideration here, contrary to the views of the applicant, the designation of her services does not depend only on the performance of the same duties over a considerable period; what is important instead for the full recognition of her administrative status as that of a member of the temporary staff within the meaning of Article 2 of the Conditions of Employment is that in the detailed list of posts for the department in question there should be a permanent post with the relevant duties and secondly that there should be an express assignment to such a post by the competent employer. In this respect the Commission has rightly referred to the definitions contained in Articles 2 and 3 of the Conditions of Service, which run as follows:

"For the purposes of these Conditions of Employment 'temporary staff' means: . . .

(b) staff engaged to fill temporarily a permanent post included in the lists of posts appended to the section of the budget relating to each institution" (Article 2);

and

"For the purposes of these Conditions of Employment, 'auxiliary staff' means:

(a) staff engaged, within the limits set in Article 52, for the purpose of full-time or part-time duties in an institution but not assigned to a post included in the list of posts appended to the section of the budget relating to that institution" (Article 3).

Furthermore the relevant case-law in this question is quite unambiguous. I would recall only the judgment in Case 18/63 — *Wollast née Schmitz* v *Commission of the EEC,* judgment of 19 March 1964, [1964] ECR 85 — which concerned the integration of the applicant as an official after the coming into force of the Staff Regulations of Officials, the judgment in Case 5/76 — *Heinz Günther Jänsch* v *Commission,* judgment of the Court of 15 June 1976, [1976] ECR 1027 — where the dispute concerned exceptions from the competition procedure for officials within the meaning of Article 92, or judgments concerning claims to higher grading having regard to actual performance of duties of a higher grade (as for example in the judgment in Case 189/73 — *Gijsbertus van Reenen* v *Commission,* judgment of 19 March 1975, [1975] ECR 445). If these judgments are to be followed — and they must be if budgetary powers and prerogatives which are reserved to the appointing authority are not to be

undermined — it does in fact emerge that the applicant's contracts under discussion here cannot be regarded as contracts for the employment of temporary staff within the meaning of Article 2 of the Conditions of Employment.

This is certainly true for the first years of her employment in which no corresponding post was available. Whether this applied until the beginning of 1963 or the beginning of 1964 was disputed at the hearing. In my view, however, the Commission has shown that only the latter date can be correct. A decision of the administrator of the Information Office regarding the use of a post assigned to him in January 1963 was not sufficient; what was still required was the approval of the detailed list of posts so determined by the Committee of four presidents which — as may be seen from a note of 13 September 1963 (Annex 25 to the application) — had not been given by the end of 1963. A note of the applicant's superior officer of 24 October 1968 (Annex 30 to the application) was expressed moreover in this sense, mention being made of the fact that until the beginning of 1964 there had been in the detailed list of posts for the Information Office no post corresponding to the duties of the applicant.

But even for the remainder of the period under consideration here the contractual position of the applicant cannot be regarded as that of a member of the temporary staff. Thus in January 1964 the permanent post in question was the subject of a competition within the ECSC, in August 1964 of an inter-institutional competition and in January 1965 of an open competition. During the course of these procedures the post was unoccupied; in particular it was not temporarily assigned to the applicant — which would have been possible — but on the contrary the Commission, having regard to this competition, expressly concluded with the applicant (see Annex I to the reply) a contract as a member of the auxiliary staff for a fixed period. The applicant also took part in the competition; in April 1965 she was placed first on the list of suitable candidates. Nevertheless at the end of 1965 the post was occupied by another candidate, who was just below the applicant in the list of suitable candidates. From then on there was for the time being no permanent post for the duties of the applicant in the Information Office. Such a post became available again only from 1 January 1969 on the basis of a temporary transfer by the Directorate General for Agriculture (see Annex 33 to the application), and from then on the applicant did in fact have a temporary post within the meaning of Article 2 of the Conditions of Employment until 31 December 1971. When the post in question subsequently had to be given back to the Directorate General for Agriculture there was then again a lack of a suitable permanent post for the applicant in the Information Office and therefore she was once again engaged as a member of the auxiliary staff for eleven months, as has already been mentioned.

In view of this stage of affairs it may be stated that, partly on budgetary grounds, but also with regard to the rules of the Conditions of Employment of Other Servants, it is not possible to accept that the applicant was in fact, from 1 January 1961 until her appointment as a probationary official, in the position of a member of the temporary staff within the meaning of Article 2 of the Conditions of Employment.

2. In the second place the applicant claims that the Commission was guilty of a wrongful act or omission in determining the nature of her contract of employment. They wrongly treated the applicant as an expert; with regard to the contracts for appointment as a member of the auxiliary staff it must be objected that they applied for more than one year and that this arrangement was selected again after the applicant had already been employed for three years as a member of the temporary staff. She claims that this represents an infringement of Article 52 of the Conditions of Employment as well as of the duty to assist employees to which reference is made in Article 54 of the Conditions of Employment by reference to Article 24 of the Staff Regulations of Officials. The applicant in this way suffered damage because the relevant periods were not taken into account for the calculation of her pension. She claims that for this the most appropriate compensation would be as it were in kind, that is to say by the periods in question being treated in the same way as periods of employment of temporary staff.

As regards this attempt to justify the applicant's claim it must be admitted without further ado that the Commission has behaved unlawfully at certain times and in certain respects — which is the first if not the only precondition for an action to establish liability on the part of the administration. This is true inasmuch as a contract was concluded with the applicant as an expert although in fact there arose a regular relationship of employment. It is true also inasmuch as the contracts for an appointment as a member of the auxiliary staff exceeded the permissible period of one year (Article 52 (b) of the Conditions of Employment). It must of course be borne in mind that the Conditions of Employment came into force only on 1 January 1962 so that it is only possible to speak of the illegality in question from 1 January 1963. On the other hand I should not like to assume that there was a similar illegality also for the period after the expiration of the employment as a member of the temporary staff. At that time the contract as a member of the auxiliary staff applied only for a period of eleven months; furthermore in my view it is not possible to deduce from Community law a prohibition on concluding a further contract as a member of the auxiliary staff after the expiration of employment as a member of the temporary staff. However, for this period at least, that is to say for the year 1972, it must be stated that there has been a breach of duty to assist an employee because the Commission was not sufficiently concerned to secure an alteration in the status of the applicant in a manner which would be satisfactory as regards her claims to pension. Over and above this it may in my view also be accepted that there was a breach of this duty for an essentially earlier period because the intention was formed at a very early date to employ the applicant permanently — I refer in this respect to Annexes 25 and 30 of the application — because her suitability for establishment as an official was already clear after her participation in the competition in 1965 and because the Commission obviously — as became fully clear in the oral procedure — undertook the filling of the post on the basis of the competition in question in a manner which is open to objection since the candidate who was appointed was not assigned to the duties mentioned in the competition, which are identical with those of the applicant, but a very short time later was assigned to other duties.

However, as I have already stated, the fact that provisions of law have been infringed is not sufficient. It must further be established that the damage alleged

has resulted directly therefrom, that is to say that there was a possibility to produce by other means, a situation according to which it would have been permissible to take the years of service into account for the calculation of pension; furthermore it must be possible to speak of negligence.

According to the explanations already given the decisive question is whether there was in existence a permanent post which could be used for the applicant or whether such a post could and should have been created. If this was not the case then in any event the finding that the applicant was wrongly employed on the basis of a contract as expert, means that for that period she must be regarded as a member of the auxiliary staff; the other finding, that contracts as a member of the auxiliary staff were concluded for a period exceeding one year in contravention of Article 52 (b) of the Conditions of Employment, would then have the consequence that the relationship of employment ought to have been ended at the latest on 1 January 1963.

With regard to this important question it must be noted first that before the beginning of 1964 there was in existence no permanent post with the duties of the applicant in the Information Office. Nor has any evidence been given for this period which would justify the assumption that the provision of such a post would have been possible and appropriate. However, it must not be forgotten that we are here dealing with the exercise of the right of an authority to set up its own organization, in which connexion a wide discretion is available. In my view there is not the slightest indication that, as regards the distribution of the posts which at the beginning were in short supply, this discretion was wrongfully exercised. However, a post was available from the beginning of 1964 until the decision as to how it was to be occupied, and, as has been shown, such a decision was adopted at the end of 1965 in a manner which was open to objection. At least for this period it would have been possible to avoid an illegality to the disadvantage of the applicant by her temporary assignment to this post. Moreover it is impossible to see any logical reason why this was not done such as would provide a justification for denying the existence of a wrongful act or omission, as the carrying out of the competition would certainly not have been impeded by an assignment of this post for an indefinite period, terminable at the proper time, to the applicant. For the subsequent period there was then no longer any post available apart from the years 1969 to 1971, for which it was possible for a post to be "borrowed" from the Directorate General for Agriculture and this was in fact used for the applicant. For this period however, that is to say for 1966, 1967 and 1968 and 1972, simply to adopt the same conclusion as for the period before 1964 does not seem to me to carry conviction. The problem of the satisfactory settlement of the applicant's administrative status had become especially urgent at the latest from the middle of the sixties. This and the fact that for the years 1969 to 1971 it was possible for a post to be provisionally provided, might rather justify the conclusion that a corresponding solution ought to have been sought for the years 1966 to 1968 and for 1972 and that in such a large organization this ought to have been possible for the Commission. However, if this conclusion is not regarded as justifiable in the present state of our knowledge, it would presumably be appropriate to obtain a further clarification of the question of the availability of posts in other departments of the

Commission, unless an appropriate and equally valid solution is to be found by means of considerations which play a part in the framework of the third submission which still remains to be investigated.

In so far as the preconditions for a claim to establish liability on the part of the administration are obviously present — that is to say for the period from the beginning of 1964 to the end of 1965 — it still remains to consider two objections of the Commission before it can be acknowledged that for the period in question in relation to the calculation of her pension the applicant has a claim to *restitutio in integrum.* These objections relate to the question of the applicant's contributory fault, and to the fact that we are not dealing with present and certain damage but at the most with future hypothetical damage, for proving which there are strict requirements according to the case-law of the Court.

In my view these points need not detain us long. On the one hand I am convinced that we can hardly speak of any relevant contributory fault on the part of the applicant arising from the fact that she assented to an extension of her contracts as a member of the auxiliary staff in excess of one year and did not exert herself to secure a regularization of her position by applying for other posts for which the competitions were held. In this respect in is sufficient to refer to the fact that there was an unreserved desire to keep the applicant because of her services and because the duties which she performed were regarded as important; in this respect the constant attempts to regularize her position and the repeated promises to do so are also of significance. In this connexion I refer to the notes of her superiors which have been laid before the Court as Annexes 25, 30 and 33 to the application. On the other hand as regards the problem of future damage which will only be realized when she enters upon her retirement I would take the view that it is sufficently foreseeable within the meaning of the case-law referred to by the Commission. Furthermore it is not irrelevant in respect of the already existing and continually increasing right of future enjoyment to speak of existing and not merely hypothetical damage for which compensation may be awarded now even if this does not mean the acknowledgment of a present financial entitlement.

Thus, in so far as the application is based on a breach of official duty it may be recorded that at least for part of the period in question, namely for the years 1964 and 1965, it is in any case well founded and that the Commission is therefore required to take at least that period into account for the calculation of pension.

3. Finally the applicant bases her claim also upon the principles of equity, equality of treatment, justice and good administration, which are breached by the refusal of the Commission to equate the periods in which the applicant was employed as an expert or as a member of the auxiliary staff with periods of employment under Article 2 of the Conditions of Employment or in any event for the calculation of pension. The applicant claims that as she actually served without interruption from 1961 to 1972 in a similar capacity to an official and as there had been from the beginning an intention to employ her permanently it must appear in the highest

degree unjust not to take this into account in the pension. In addition it is of interest that in the case of another employee the procedure adopted was in accordance with her argument and that after his appointment as an official the time which he had spent as an expert working for the Community was recognized as capable of being taken into account for pension purposes.

Against this the Commission has claimed that it is not possible to approve, by reference to principles of natural justice, a solution which is not in accordance with positive law. It states in particular that this would conflict with case-law (Case 54/70 — *Luigi Landra* v *Commission of the European Communities* — judgment of 1 April 1971, [1971] ECR 311) in accordance with which in the calculation of years of pensionable service in accordance with Article 3 (c) of Annex VIII to the Staff Regulations periods of service as a member of the auxiliary staff cannot be taken into account. The Commission states that it should also be borne in mind that with the solution contended for by the applicant periods would be recognized as reckonable for pension purposes for which contributions had not been paid in accordance with Article 3 of Annex VIII to the Staff Regulations and that for these periods there would then be various claims to entitlement to an old-age pension. With regard to the case cited by the applicant of another employee for whom such a treatment was made available the Commission thinks that finally it should not be overlooked that that case was different inasmuch as there an appointment as official followed immediately after the period of employment as an expert.

With regard to this contest it must certainly be admitted that it naturally appears extremely problematical to justify by reference to the principles which have been mentioned a solution which according to the wording of the provisions applicable is excluded. However, in consideration of the fact that the written law of official employment, in spite of all its nuances, does not contain an exactly appropriate solution for every situation, I do not regard such an attempt *a priori* as inadmissible. It is true that extreme caution and reserve are required. Such a procedure can really only be contemplated in extremely exceptional cases in which, when all the circumstances are taken into account, a purely legalistic result would obviously be unjust. In addition care must naturally be taken to ensure that the requirements of the written law are affected as little as possible.

In the present case it is significant that the applicant, obviously on organizational and budgetary grounds, was left in a precarious situation for an unreasonably long period of time. It was clear at a very early stage — as has been shown — that she was to be permanently employed and it is incontestable that she performed duties of importance to the Communities. It is also acknowledged that the applicant took part in a competition for a post corresponding to her duties, that she emerged as top of the list, but that the post which was the subject of the competition was not assigned to her but — as was grossly incorrect — to another candidate and subject to a change of duties. Last but not least, it should be borne in mind that the applicant is not asking for a retroactive change in her status with all the consequences involved but merely raising the question of the calculation of her pension.

In this situation there should be no hesitation to regard her claim for equal treatment in principle as well founded. I regard this as justified at any rate from the period in which it was regarded as

proved by her successful participation in a competition that she could be appointed to a post as an official. It would be difficult to justify more far-reaching results in favour of the applicant on the other hand by reference to the principles in question here — although what has been said with regard to the claim to establish liability on the part of the administration naturally remains true. It would therefore hardly be justifiable to declare the recommended partial settlement as permissible with effect from 1963 — and in any case exception cannot be taken to the manner in which her administrative status was settled up to the end of 1962. In this respect too the case of another expert quoted by the applicant can hardly be of assistance, for not only does it show the unusual feature that an appointment as official followed immediately after the period of employment as an expert but also the retroactive regularization covered a period of only roughly two and a half years.

Over and above that it also seems necessary to me — and this relates to the taking into account of the requirements of written law — to take care that no unjustifiable advantages are conferred on the applicant as a result of the retroactive equality of treatment for which she contends. However, in this respect no problems should arise since the applicant has expressly declared herself ready to make back payment of contributions for the periods in question on the basis of the payments to be made by officials and temporary employees and to assign to the Community any claims which she may have as against the Belgian social insurance which she has earned as a member of the auxiliary staff.

If effect is given to all this — and naturally the judgment quoted by the Commission in Case 54/70 is not affected — the result would be that the applicant has a claim for equal treatment not only in relation to the period in which an unoccupied post corresponding to her duties was available in the Information Office but over and above that for the subsequent period (1966 to 1968 and eleven months in 1972), for which there was no such post and for which it is not absolutely certain whether in that respect it is possible to speak of a wrongful act or omission.

4. Thus it may be stated that the refusal of the Commission to recognize the periods of service performed by the applicant as an expert or as a member of the auxiliary staff for the calculation of her pension is unlawful in so far as it concerns the period from the beginning of 1964. On this understanding and taking into account the necessity to make back payments of contributions and to avoid the applicant's being entitled to claim for the period in question both payments from the Belgian social insurance and payments of pension under Community law, the statements made by the administration of the Commission referred to in the applicant's complaint should be annulled. As regards the costs of the action, as in my view the applicant has to a considerable extent won her case, I should regard it as appropriate to order the Commission to pay two thirds of her costs.